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No. 86-1334

In The
Supreme Court of the United States
October Term, 1986

JOHN M. SKEVIN,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF

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I.

THE RESPONDENT RELIES UPON AN ERRONEOUS LEGAL STANDARD IN CLAIMING THAT PETITIONER'S ISSUES NOS. 1 AND 2 WERE NOT ADEQUATELY PRESENTED TO THE COURT BELOW

INTRODUCTION

As it now stands, in New Jersey and other states that have adopted *In re Wilson,* 81 N.J. 451 (1979), an attorney with, for example, 40 years of unblemished service to the state *must* be disbarred if he or she "knowingly" misappropriates ten, twenty or thirty dollars of trust money; and "knowingly" no longer means with intent to steal or defraud. That irrational and draconic rule created in the context of a laudable effort to stem attorney corruption must be overruled by this Court before many lives, reputations and careers are ruined and this Court is saddled with the weight of those ruins.

Respondent has advanced a series of hypertechnical arguments based upon 28 U.S.C. Section 1257(3) to avoid review of New Jersey automatic disbarment rule in this Court. As explained below, such contentions lack merit.

A. The Respondent New Jersey Supreme Court Violated Petitioner's Federal Constitutional Rights After Submission Of Briefs Below; That Violation Of Rights Was Unforeseeable

In the proceedings below, the Supreme Court of New Jersey functioned in its original jurisdiction, as a trial court, deciding the legal issues involved herein *for the*

first time.[1] Short of fortune-telling, it was therefore impossible for the petitioner to fully brief issues of law raised, *for the first time,* by the New Jersey Supreme Court's decision (obviously issued *after* submission of briefs) which abandoned long-standing constitutional norms governing attorney discipline.

No court of law heard Mr. Skevin's case prior to a hearing by the Supreme Court of New Jersey. Thus legal issues were not fully developed and expounded upon prior to that Court's decision. A special master held a hearing and made *factual* findings for use by the Disciplinary Review Board ["DRB"], an intermediate body composed of lay persons and attorneys. That body adopted the factual findings of the special master and recommended disbarment. The Supreme Court of New Jersey then heard the matter *de novo* upon the record developed below and, on November 14, 1986, issued its findings of fact and, *for the first time,* conclusions of law. [Petition for Cert., App. A].

Before issuance of the opinion in this case, there was no clear indication that the New Jersey Supreme Court was prepared to completely abandon the constitutionally compelled inquiry into an attorney's character and fitness prior to disbarment, *Schware v. Board of Examiners of New Mexico,* 353 U.S. 232 (1957), or that the Court would conclusively presume corrupt intent from facts that did not involve theft or fraud.

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[1]See *In re LiVolsi,* 85 N.J. 576 (1981) ruling that "this Court's plenary constitutional authority includes *original jurisdiction* over cases involving the "disciplining of attorneys. . . ." *Id.* at 584 (Emphasis Supplied).

Indeed, in *Matter of Noonan,* 102 N.J. 157 (1986), decided a few months before the New Jersey Supreme Court's decision in this case, that Court, despite tough sounding *dictum, declined* to find knowing misappropriation and *declined* to disbar an attorney on facts remarkably similar to those presented here. Moreover, in *Matter of Noonan,* the Court, quoting the DRB report noted, in compliance with *Schware, supra,* that the attorney "had no prior ethical problems . . . had a good reputation and has admitted that his conduct transgressed the rules." *Id.* 102 N.J. at 165.

This case was the first published decision of the Supreme Court of New Jersey wherein an attorney was disbarred without meaningful inquiry into his current character and fitness to practice law and wherein *knowing* misappropriation was conclusively presumed from the bare fact that there were accounting discrepancies in a trust fund, discrepancies that never led to a client's being deprived of funds, discrepancies concededly not motivated by an intent to steal or defraud.

B. Petitioner Nevertheless Did Raise Below The Constitutional Challenges Now Urged In His Petition For Certiorari

Notwithstanding the unpredictability of the decision in this matter, counsel below managed, prior to issuance of the New Jersey Supreme Court's opinion, to divine and, albeit briefly, address the issues now presented here. As discussed at length in the Petition for Certiorari at 20 to 21, counsel below, citing *In re Arndt,* 67 N.J. 432 (1975),

a case explicitly adopting *Bell v. Burson*,[2] 2 U.S. 535 (1971), and further citing *Erdman v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889, argued against a "presumption of guilt" [Resp. Brief, App. 42] and reminded the Court that "an attorney is innocent until proven guilty." [Resp. Brief, App. 43] To presume guilt, counsel argued, "will represent a substantial departure from current law, and a reckless disregard for the *due process rights* of attorneys who come before them [the Disciplinary Review Board] for discipline." [Resp. Brief, App. 42] (Emphasis Supplied).

In his motion for a stay of the disbarment order, petitioner's counsel submitted to the New Jersey Supreme Court a near-final draft of a motion for a stay in this Court that fully briefed the issues presented below in connection with *Schware, supra*. Annexed to this Reply Brief as Appendix A is a true copy of the pertinent argument portion of that submission which included extensive discussion of this Court's relevant decisions. Notwithstanding the foregoing submissions, the New Jersey Supreme Court stood firm on its decision to disbar the petitioner and chose not to address any of the federal issues.

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[2] *In re Arndt, supra*, holds,

> [L]icense-revocation proceedings do realistically affect drivers in a serious way, often threatening their ability to earn a livelihood, and it is settled they must meet those incidents of fairness underlying due process. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971); *David v. Strelecki, supra* (51 N.J. at 566).

Id., 67 N.J. at 436.

C. Petitioner Meets This Court's Standard As To The Adequacy Of The Presentation Of Federal Issues Below

Where, as here, a petitioner for certiorari seeks review of a State Supreme Court decision that was issued in the original jurisdiction of that court, this Court, recognizing the difficulty of anticipating constitutional issues, has used a relaxed standard in evaluating the presentation *vel non* of federal issues below. See, e.g. *Saunders v. Shaw,* 244 U.S. 317, 320 (1917). See also, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehney,* 281 U.S. 313, 320 (1930).

"[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 85 N. 9. Here, although it could *not* have been predicted that the Supreme Court of New Jersey would completely abandon the *Schware*-compelled character and fitness inquiry or that the New Jersey Court would transform the meaning of knowing misappropriation to include acts that do not involve corrupt intent, petitioner's counsel managed to raise the relevant issues of due process. *A fortiori,* therefore, under *Robins, supra,* (which in these circumstances would forgive a *failure* to raise federal issues below) the federal issues involved in this case were adequately presented for purposes of 28 U.S.C. Section 1257(3).

The respondent would hold the petitioner up to a severe, if not impossible, standard in determining whether

federal issues were properly presented below. It is not enough for respondent that petitioner explicitly decried a violation of "due process" resulting from the "presumption of guilt" below. The reference to "due process," respondent argues, harking back to the age of formula pleading, must be deemed to refer only to the due process clause of the New Jersey *State* Constitution. [See Resp. Brief at 9]. That contention fails because *there is no such State due process clause.* The clause cited by respondent, *but not quoted by respondent* [Resp. Brief at 9], is as follows:

> **1. Natural and unalienable rights**
>
> 1. All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.[3]

Thus, the petitioner's reference to "due process" *had* to refer to the federal constitution, since there is *no* state constitutional due process clause.

Respondent argues that absent citation and extended discussion of this Court's federal due process cases in its

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[3]Contrast the foregoing generalized description of inalienable rights to the state constitutional clause in *Miller v. Cornwall Railroad Company*, 168 U.S. 409 (1897), which provided that every person "shall have a remedy [for legal wrongs] by the *due course of laws*. *Id.* at 411. In that case, this Court concluded that there was a state due process clause and that, therefore, bare references to due process were to be construed as state, not federal, claims for purpose of 28 U.S.C. Section 1257(3). Here, there is no state constitutional language such as in *Miller*.

first brief to the New Jersey Supreme Court, and absent a specific use of the words "Fourteenth Amendment," petitioner has failed to satisfy 28 U.S.C. Section 1257(3). [Resp. Brief at 9]. Such has never been this Court's view.

No particular words need be used to raise a federal question below. *Dewey v. City of Des Moines,* 173 U.S. 193, 197-198 (1899). In *Braniff Airways v. Nebraska State Board of Eq. & A.,* 347 U.S. 590 (1954), this Court heard an appeal from a judgment of the Nebraska Supreme Court although "appellant name[d] the wrong constitutional clause [i.e., the Commerce Clause] to support its position." Though appellant's claims below were "inexplicit," this Court found his "due process issue within the clear intendment of [appellant's inexact] contention and h[e]ld such issue sufficiently presented" below. *Id.* at 599.

Clearly, issues one and two of the petition for certiorari are within the "clear intendment", *Braniff, supra,* of petitioner's claims below that the New Jersey disciplinary system violated the "due process rights of attorneys" [Resp. Brief, App. 42] with a "*presumption* of guilt" [Resp. Brief, App. 42] at odds with the rule that an "attorney is innocent until proven guilty." [Resp. Brief., App. 43]. It is precisely the conclusive *presumption* of unfitness, and the conclusive *presumption* of corrupt knowledge, that lie at the heart of issues one and two. Those issues are precisely encompassed by the phrase "presumption of guilt" contained in the brief below.

This Court has always had considerable discretion in determining whether a federal issue has been adequately presented below. In *Illinois v. Gates,* 462 U.S. 213 (1983),

this Court has observed that it even "possessed discretion to *ignore* the *failure* to raise in state court the question on which it decided the case." *Id.* at 218 (emphasis supplied) citing *Vachon v. New Hampshire,* 414 U.S. 478, 479 N.3 (1974) and *Terminiello v. Chicago,* 337 U.S. 1 (1949).

Here, discretion should be exercised to grant certiorari, notwithstanding any alleged or real lack of precision in the presentation below. The rationale underlying 28 U.S.C. Section 1257(3) will not be offended by a grant of certiorari here. That rationale—permitting state courts to entertain a federal constitutional challenge prior to this Court's review in order that the state court may save a state statute or procedure with a limiting construction, *Cardinale v. Louisiana,* 394 U.S. 437 (1969)—is not undermined here. Even had petitioner's federal issues been presented below as sharply as they have been presented here, the New Jersey Supreme Court would have dismissed those claims as meritless.[4] In its brief here, the Supreme Court of New Jersey has so characterized petitioner's claims. [Resp. Brief at 10 *et. seq.* and 17 *et. seq.*] The New Jersey Supreme Court argues here in its brief that petitioner's claims were not raised below, but raising them more precisely below would have been in vain and would have resulted only in summary dismissal of such claims.

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[4]It is noteworthy that the New Jersey Supreme Court totally ignored federal issues that it admits were fully presented below, i.e. issues arising from the breach of confidentiality. Clearly, the New Jersey Court was not prepared to address or redress any claimed deprivation of federal rights and a clearer presentation of such issues below would have been in vain.

Thus, the respondent seeks to use 28 U.S.C. Section 1257(3) in an overly technical way as a barrier to this Court's adjudication of the merits of its blanket disbarment rule.

Certiorari must be granted so that issues of national importance involved herein may be resolved and so that an approach to attorney discipline adopted by New Jersey, which is at odds with decisions of this Court, can be reversed.[5]

Respectfully submitted,

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[5] Petitioner relies upon his Petition for arguments on the merits with respect to all issues, including issue number 3. Petitioner believes it appropriate to point out that respondent has acknowledged an error in its Opposition Brief at page 19 with respect to issue number 3. There, respondent contends that the Schraeders did not breach confidentiality until *after* the evidentiary hearing below. In fact, the first *New York Times* article reflecting a breach of confidentiality appeared almost one year *before* the evidentiary hearing before the Special Master. (See Pet. App. F at 33). Petitioner hereby represents that he has been contacted by respondent who candidly concedes the chronological error on page 19 of the brief.

Appendix A

[Legal argument portion of draft motion for stay in United States Supreme Court submitted to New Jersey Supreme Court for its review in connection with petitioner's motion for a stay in the New Jersey Supreme Court]

This Court has indicated that one of the factors it will consider in deciding whether to grant a writ of certiorari is whether "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court," Supreme Court Rule 17.1(c).

Here, the New Jersey Supreme Court has embarked upon an approach to attorney discipline, now being adopted in high state courts throughout the nation, in direct conflict with decisions of this Court.

In deciding to disbar John Skevin, the New Jersey Court relied upon *In re Wilson,* 81 N.J. 451 (1979), a case in which an attorney forged a client's endorsement on a check made out to the client and literally stole the proceeds and also failed to return $23,000.00 in escrow money to a client for almost two years. There the Court ruled that in cases of knowing misappropriation of client funds, "mitigating factors will rarely override the requirement of disbarment," *id.* at 461.

In *In the Matter of Noonan,* 102 N.J. 157 (1986), a case decided just months prior to the New Jersey Court's ruling against the petitioner, the Court interpreted *In re Wilson,* supra, to mean that any invasion of trust funds

for virtually any reason will mean automatic disbarment. "It is not so" the Court ruled "that some kind of intent to defraud is required . . . *The presence or absence of 'good character and fitness,' the absence of 'dishonesty, venality, or immorality'—are all irrelevant,"* the Court declared.

In *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232 (1957), this Court held that a person may not be excluded from bar admission unless he lacks good character or is immoral and unfit. Ignoring such traits in evaluating bar membership, the Court held, amounts to a violation of the Due Process clause of the Fourteenth Amendment. There, this Court, having granted certiorari to review a state judgment excluding a person from bar membership, found no evidence of "moral turpitude", *id.* at 242, and found that "in the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies . . . cannot be said to raise substantial doubts about his present good moral character," *id.* at 246. Finding no evidence in the record which rationally justifies a finding that [petitioner] was morally unfit to practice law," *id.* at 247, this Court reversed and remanded the matter.

When the Supreme Court of New Jersey held that good character and fitness, as well as the absence of dishonesty, venality and immorality are all "irrelevant" to the issue of whether an attorney should be stricken from the rolls, it acted in flagrant violation of *Schware, supra.*

As discussed above, in disbarring John Skevin, the New Jersey Supreme Court, true to its *Wilson* standard,

completely ignored Mr. Skevin's lack of moral turpitude and unquestioned current fitness to serve his clients.

This Court has not hesitated to grant certiorari to correct such grievous errors. See *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957) (reversing state denial of bar admission where the lower court failed to prove that petitioner was "morally unfit to practice law," *id.* at 273); See also, *Willner v. Committee on Character,* 373 U.S. 96 (1963) (on certiorari to the New York Court of Appeals reversing state denial of bar admission where petitioner was deprived of fair opportunity to prove his character and fitness); *Spevack v. Klein,* 385 U.S. 511 (1967) (on certiorari to the New York Court of Appeals reversing disbarment of attorney because he had asserted the Fifth Amendment); *In the Matter of Ruffalo,* 390 U.S. 544 (1968).

Here, this Court must grant certiorari in order to stem a nation-wide violation of attorney due process rights. For, *Wilson, supra,* is being explicitly adopted throughout the nation. See *In re Marks,* 72 A.D.2d 399, 424 N.Y.S.2d 229 (1980) citing *Wilson* at 424 N.Y.S.2d at 230; *Oklahoma Bar Association v. Raskin,* 642 P.2d 262 (Okla. 1982) citing *Wilson* at 267-68; *In re Okerman,* 310 N.W.2d 568 (Minn. 1981) citing *Wilson* at 571; *Wilson* has also been cited in unpublished decisions in Maine, Texas and the District of Columbia, Johnson, *Lawyer, Thou Shall Not Steal,* 36 Rutgers L. Rev. 454 (1984) at 486.

Another reason for granting certiorari in this matter is because a novel and substantial issue of procedural due process has been implicated by the proceedings below. This Court has already ruled that where a criminal jury trial

is infected with excessive pre-trial and trial publicity, due process requires vacation of the conviction and retrial. *Sheppard v. Maxwell,* 384 U.S. 333 (1966). This Court has recognized also that judges as well as jurors may be influenced and pressured by excessive press coverage of court proceedings. In *Pennekamp v. Florida,* 328 U.S. 331 (1946) Justice Frankfurter (concurring) wrote that "To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels . . . 'Trial by newspaper' like all catch-phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country." *Id.* at 359.

This case poses the as yet unanswered question of whether 'trial by newspaper' violates the integrity of state bar disciplinary proceedings in a manner contravening the Due Process clause of the Fourteenth Amendment of the United States Constitution. Here, the Supreme Court of New Jersey conceded that it was "deeply troubled" by the "apparently deliberate breach of the confidentiality" of the proceedings against Mr. Skevin. In *Wilson, supra,* the Court frankly admitted that it sought harsh penalties for misappropriation in order to preserve its public image and to maintain "public confidence," *id.* at 81 N.J. 456. Given the press clamor for Skevin's disbarment, the Court had no choice but to disbar him. In *Matter of Dondi,* 472 N.E.2d 281 (New York 1984), New York's highest Court found a confidentiality breach in roughly analogous circumstances to violate federal due process; this Court should find likewise. See also, *Florida Bar v. Rubin,* 362 So.2d 12 (Florida 1978).